IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1179

JOHN ASHCROFT, Attorney General,
State of Missouri,
Appellant,

—v.—

ROBERT DEAN MATTIS, M.D.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

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The appellee, Robert Dean Mattis, M.D., respectfully moves that this Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this action on December 1, 1976, on the grounds set forth herein.

OPINIONS BELOW

As brought out by appellant's statement, but not in his account of opinions below, there were two proceedings in the district court, each followed by an appeal to the Court of Appeals. The opinions of the United States District Court for the Eastern District of Missouri, in connection with the first proceeding, were not reported but are printed in the appendix of the first appeal, now certified to this Court, at pp. 15-30, 31, 34-36 and 37. The opinion of the United States Court of Appeals for the Eighth Circuit, reversing that judgment and remanding for a determination of the constitutionality of the challenged statute, is reported at 502 F.2d 588. The opinion of the District Court on remand following the second hearing is reported at 404 F.Supp. 643. The opinion of the Court of Appeals on the second appeal is reported at 547 F.2d 1007 and is set out in appellant's jurisdictional statement at pp. A1-A33.

JURISDICTION

Appellee does not question the present jurisdiction of this Court.

QUESTIONS PRESENTED

Appellee accepts appellant's formulation of the questions presented for review.

STATUTES INVOLVED

The statutes involved are correctly set forth in the Jurisdictional Statement. But we would note that the court of appeals limited its adjudication to that portion of the Missouri statute on justifiable homicide which provides as follows:

Revised Statutes of Missouri,

§559.040. Justifiable homicide. - Homicide shall be deemed justifiable when committed by any person in either of the following cases:

...(3) when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully supressing any riot or insurrection, or in lawfully keeping or preserving the peace.

STATEMENT

Appellee accepts the statement of appellant, with the following exceptions. The original complaint was actually filed on January 3, 1972. It is not clear what appellant means when he states that the opinion of the Court of Appeals on the first appeal, Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974), which remanded the case for a determination of the validity of the statutes, was not contested. It is of course true that no review by this Court was then sought, and it probably would have been unavailable. But the Attorney General of Missouri, although he was not then a party to the litigation, filed an amicus curiae petition for rehearing or transfer to the court en banc, objecting to the suggestion in that opinion that he was free to intervene, which motion was denied by an even vote.[1/]

1/ On that first appeal, the Court of Appeals held that the appellee, Dr. Mattis, had standing to challenge the constitutionality of the deadly force statute pursuant to which authority his son was killed, and that the defenses of good faith and probable cause available to the officers would not bar declaratory relief. Accordingly, the Court of Appeals remanded the matter for a determination of the merits of that question.

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That holding was correct. The appellee had standing because, as the Court of Appeals found, the operation of the statute directly infringed his constitutionally protected right relating to "the familial relationship between parent and child," 502 F.2d at 594-95, a right long recognized and given protection by this Court. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); May v. Anderson, 345 U.S. 528 (1923); Armstrong v. Manzo, 380 U.S. 545 (1965). "[W]here, as here, the result of ...[the operation of the statutes] was permanently to deprive a legitimate parent of all that parenthood implies," Armstrong v. Manzo, supra, 380 U.S. at 550, the aggrieved parent meets the basic condition of standing identified in and required by cases such as Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970). The interest of Dr. Mattis was far more than "aesthetic, conservational, and recreational," Data Processing, supra, 397 U.S. at 154; rather his was a right "far more precious than property rights," May v. Anderson, supra, 345 U.S. at 533.

Similarly, the injury which Dr. Mattis suffered as a result of the statute's operation - the permanent loss of his son - made him an appropriate litigant to seek the declaratory relief rendered below. His injury was aggravated by the fact that his son's death was brought about in violation of the Constitution. That injury is and will continue to be mitigated by the judi-

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cial declaration that the death was wrongful, and by the guarantee resulting from that declaration that his son did not die in vain and that other young men will not die in the same circumstances. Therefore, appellee properly has a stake in the outcome of this suit and in the relief granted, and the court below properly concluded that the appellee's interests presented the appropriate occasion for adjudicating the constitutionality of the challenged statute.

THE QUESTIONS ARE NOT SUBSTANTIAL AND THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED.

The holding of the Court of Appeals is that the Missouri statutes which authorize the use of deadly force against all suspected felons fleeing from arrest, but not against any fleeing misdemeanants, are "unconstitutional as applied to arrests in which an officer uses deadly force against a fleeing felon who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer or others if not immediately apprehended." (J.S. A2-A3). This holding is compelled by the decisions of this Court in the death penalty cases and other cases, is consonant with sound, modern law enforcement practices, and is not in conflict with other lower court decisions.

1. The Judgment Rests on a Solid Precedential Foundation.

Appellant staunchly presses the district court's assertion that the right to life was not involved in this case, in which appellee's son was shot to death, and that the statutes placed their burden not upon life but upon flight from a lawful arrest. Then he clings to his own argument that to hold that the right to

life is denied by the Missouri statutes ties the court's opinion to the particular outcome of a particular case (J.S. 7). All this is offered in the face of statutes that authorize deadly force, which was used, and which killed. The Court of Appeals correctly disposed of the district court's transparent fallacy by noting that the question was not whether Michael Mattis had a right to burglarize the golf driving range and then flee - concededly he did not - but whether his life could be taken without due process once he did so (J.S. A19-20, n. 22). The bullet did stop the flight, but it killed Michael Mattis. And, of course, the Court of Appeals dwelt on the fundamental right to life and its deprivation here (J.S. A19-A23). Similarly, appellant's argument that policemen acting under the statutes do not necessarily or always kill fleeing felons whom they cannot catch supports appellee's argument that police practice in this respect is indeed capricious, thus coming directly under the ban on such state-inflicted death pronounced by Furman v. Georgia, 408 U.S. 238 (1972). That same case, decided when only nine states had permanently abolished capital punishment, also effectively answers the contentions that never before has a court so contravened the legislative will as the Court of Appeals did in this case.

As that court observed (J.S. A22), the recent death penalty cases of this

Court established that the Constitution permits the taking of life by the state as punishment for certain aggravated forms of murder, but only under "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Gregg v. Georgia, ____ U.S. ____, 49 L.Ed.2d 859, 887 (1976). By the same token, if a policeman is to take an offender's life, he must be given some better guidance than is afforded by the bare word "felony," which has lost all its intrinsic significance, and the scope of which he cannot be expected to know or remember. Appellant suggests "that the proper standard is whether the application of force exceeds what is reasonable and necessary under the circumstances." (J.S. 7). But, as the Court of Appeals noted (J.S. A7), deadly force was "reasonably necessary" in this case on the assumption that Michael Mattis had to be brought down at all costs; but to make such an assumption is simply to beg the question. "[T]he fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of inflicting the penalty of death." Woodson v. North Carolina, ___ U.S. ___, 49 L.Ed. 2d 944, 961 (1976).

The paramount importance of human life means that deadly force is never warranted for an offense solely against property, and that no policeman, in his sole discretion, should be allowed to decide to the contrary. In any event, once it is recognized that policemen cannot, should not, and do not follow the guideline of felony as against misdemeanor, which appellant seems to acknowledge by way of his "reasonable and necessary" formula, then some other guideline must be given them. In the first instance, formulation of any guideline is for the legislature. But when the formulation fails to pass constitutional muster, it must be declared invalid in a judicial proceeding. As Mr. Justice Black observed, concurring in Gregory v. City of Chicago, 394 U.S. 111, 120 (1969): "...under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat."

If under the decisions of this Court the state legislature cannot take human life by the imposition of a mandatory formula, no matter how detailed its provisions, Roberts v. Louisiana, ___ U.S. ____, 49 L.Ed.2d 974 (1976), then certainly it cannot do so by using the shibboleth "felony." The fact that in practice the police capriciously follow or ignore that shibboleth only makes the situation that much worse under Furman.

Also of great importance here is the recognition since Weems v. United States, 217 U.S. 349 (1910), that the punishment must be proportionate to the crime. Death is "an extreme sanction, suitable to the most extreme of crimes," Gregg v. Georgia, supra, ___ U.S. ___, 49 L.Ed.2d at 882. Indeed, as Mr. Justice Rehnquist conceded in Woodson v. North Carolina, supra, 49 L.Ed.2d at 965: "If this case involved the imposition of the death penalty for an offense such as burglary or sodomy, ... the virtually unanimous trend in the legislatures of the States to exclude such offenders from liability for capital punishment might bear on the plurality's Eighth Amendment argument." (emphasis added). The Court of Appeals properly concluded that the sweeping authorization of deadly force embodied in this statute does not conform to the principles applied in this Court's death penalty cases.2/

2/ While this Court employed the Eighth Amendment in the death penalty cases, the Court of Appeals decided this case primarily under due process, although it utilized doctrines developed in the areas of cruel and unusual punishment and equal protection. Appellee also presented Eighth Amendment arguments to the court below, and Howell v. Cataldi, 464 F.2d 272 (3rd Cir. 1972), cited with approval by appellant, holds that in constitutional terms it is possible for cruel and unusual

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Appellant accuses the Court of Appeals majority of failing to recognize the valid state interests involved. To the contrary, the court indeed recognized those interests, analyzed them extensively, but concluded that this sweeping statute was not necessary to serve such interests:

> We find nothing in this record, in the briefs of the parties or of the Attorney General, in scholarly literature, in the reports of distinguished study commissions, or in the experience of the nation's law enforcement agencies, to support the contention of the state that statutes as broad as these deter crime, insure public safety or protect life (J.S. A25).

Stripped to its essentials, the interest of the state served by these statutes is that no suspected offender whose offense has been labeled a felony

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punishment to be inflicted by the police on an arrested person before trial. What must be seen here is that once the policeman determines that he cannot overtake the fleeing felon and decides to shoot him, he is punishing him. If he only wounds him, he may also accomplish his legitimate purpose of bringing him to trial; but if he kills him, it is punishment pure and simple. And that is what happened to Michael Mattis.

shall escape trial. That interest weighs something, even for the pettiest felony, but for the felony of breaking into a small unoccupied office to steal the small change presumably there, does it outweigh the value of a human life? Appellant cannot bring himself to say so, and instead in this wrongful death case he mulishly refuses to see any involvement of human life. He fails to put anything at all on the appellee's side of the scales, even though our constitutional heritage is informed by the understanding that there are higher values than perfectly effective law enforcement. The Court of Appeals properly balanced the competing societal interests and reached the valid conclusion that the authorization of deadly force in this situation unconstitutionally tipped the balance against the individual. The exact same balance was struck by Mr. Chief Justice Burger who once drew an analogy that perfectly fits this case:

> I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 419 (1971)(dissenting opinion).

Finally, the decision below is also sustainable under an equal protection analysis.[3] In at least four cases this Court has refused to let rights in the criminal justice process hinge on the meaningless present-day distinction between felonies and misdemeanors: Carroll v. United States, 267 U.S. 132 (1925); Groppi v. Wisconsin, 400 U.S. 505 (1971); Mayer v. City of Chicago, 404 U.S. 189 (1971); Argersinger v. Hamlin, 407 U.S. 25 (1972). This ground as well, although not explicitly reached by the Court of Appeals, is sufficient to sustain the judgment.

2. Contrary Opinions Are Too Weak to Present a Conflict.

Appellant asserts that there is a broad array of authority against the Court of Appeals in this case. Upon close examination, however, there is no true conflict.

3/ Of course the Court of Appeals did not call this "the wildest argument," nor did appellant mean to say so, as he did at J.S. 10. The quoted words are clearly a phonetic misprint for the phrase, "that while this argument" was not without merit, it did not have to be reached. See J.S. App. A26, n. 32.

For example, while the appellant claims that the Second Circuit upheld the constitutionality of statutes similar to those of Missouri in Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975), in fact that court, although asked to pass on that question, expressly declined to do so, 528 F.2d at 136, n. 9. Similarly, while the three-judge court in Cunningham v. Ellington, 323 F.Supp. 1072 (W.D. Tenn. 1971), sitting in the Sixth Circuit, upheld the constitutionality of a statute identical to R.S.Mo. §544.190, it did so in a painfully cavalier and superficial manner. Nevertheless, that opinion was deferentially followed without further discussion by the Sixth Circuit in Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), but with reservations expressed by Circuit Judge McCree in a concurring opinion.

Appellant also cites Wiley v. Memphis Police Department, ___F.2d___ (6th Cir. 1977, No. 75-2321), which was decided on February 10, 1977. Although there might appear to be a conflict between the decision below and the Sixth Circuit Wiley case, the latter court, having the Mattis decision before it with all its closely reasoned constitutional analysis, answered none of it. Instead, that court engaged in an angry diatribe against the Eighth Circuit for presuming to set the Constitution against the ancient acts of a legislature, and for putting policemen

under that Constitution instead of leaving them free to use their best judgment as the occasions arise. Once again, Judge McCree concurred with reservations, but this time because, as he said, "I do not regard this appeal as requiring us to decide whether the rule that permits a police officer to use deadly force to apprehend a fleeing felon when there is no threat to human life is constitutional." Slip op. at 18. His reason for concluding that the constitutional issue was not before that court was the evidence in the record that the fleeing burglars had presented an apparent threat to human life (for example, they had stolen some guns), and the opinion is permeated by suggestions to that effect, although that conclusion was strongly contested. Thus the last word of the Sixth Circuit is short of a definitive constitutional ruling, since no one here questions the use of deadly force when such a threat is made.

Similarly, appellant cites common law cases upholding the very common law rule under attack, which should come as no surprise, and which carry no authority for construing the Constitution. Even so, however, the proclaimed unanimity does not exist. In Schumann v. McGinn, 240 N.W.2d 525 (Minn. 1976), for example, a five-to-four majority of the court voted in favor of adopting as Minnesota common law the Model Penal Code rule, which is substantially the same as that constitutionally required by the Eighth Circuit

in this case. But one of the five declined to make the new rule effective immediately. And in Hilton v. State, 348 A.2d 242 (Maine, 1975), a civil case, the court declined to impose the Model Penal Code rule as the common law of Maine, but the court observed, 348 A.2d at 245, note 4, that the Maine legislature had adopted it after the events in that case. On the other hand, as far back as 1935, the Supreme Court of Virginia in Hendricks v. Commonwealth, 163 Va. 1102, 178 S.E. 8 (1935), changed or shaped its common law to make it substantially fit the standard now proclaimed in the Eighth Circuit.

Moreover, the reluctance of courts to impose new standards on the parties before them had much to do with the decisions in Beech, Wiley, Schumann, and Hilton, and, indeed, that reluctance, insofar as it applies to damages, is presumably justified by this Court's decision in Pierson v. Ray, 386 U.S. 547 (1967). But that case and those considerations have no bearing whatsoever on the availability of declaratory relief.

In short, the conflict in decisions upon which the appellant relies is more apparent than real. The decision below was carefully reasoned, anchored firmly in the principles of this Court's death penalry decisions, and should be summarily affirmed.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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